IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

vs.

MIDWEST VIDEO CORPORATION,

Respondent,

BRIEF OF THE STATE OF ILLINOIS, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street,
Chicago, Illinois 60601,

PETER A. FASSEAS,
Special Assistant Attorney General,

Counsel for The State of Illinois as Amicus Curiae.

ROLAND S. HOMET, JR.,
Of Counsel.

Printed by Authority of the State of Illinois

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

vs.

MIDWEST VIDEO CORPORATION,

Respondent.

BRIEF OF THE STATE OF ILLINOIS, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

This brief is submitted as of right under Supreme Court Rule 42 (4) for the State of Illinois as *amicus curiae* in support of the petition by the respondents below, United States of America and the Federal Communications Commission, for certiorari to the Court of Appeals for the Eighth Circuit under 28 U.S.C. Sections 1254 (1) and 2350, and Supreme Court Rule 19 (1) (b).

The State of Illinois on September 9, 1971, through its Illinois Commerce Commission asserted regulatory jurisdiction over cable television and other forms of broadband cable communications within the State. The Commission took this action after public notice and extensive

hearings requested by Governor Richard Ogilvie, to determine "the desirability of, and necessity for, and the scope and nature of, State regulation by this Commission" of the cable industry. On the basis of expert testimony and other views elicited in the course of the hearings, the Commission concluded that the provision of broadband communications services by means of present and developing cable technology is a form of "the transmission of telegraph or telephone messages within this State," within the meaning of the State statute vesting the Illinois Commerce Commission with jurisdiction to regulate public utilities. Ill. Rev. Stats., Ch. 111⅔, Sec. 10-3 (b).

The Commission's proceedings are still continuing. It has asserted jurisdiction but deferred the adoption of specific rules and regulations until after further hearings to be held on a Notice of Inquiry and of Proposed Rule Making now being formulated by the Commission. In its *Interim Opinion and Order* issued September 9, the Commission articulated as follows the over-riding public-interest objectives it will seek to realize in the course of its further proceedings:

> "(1) 'channel choice,' or the diversification of entertainment and information services available at the option of television viewers and subject to their selection, in their homes and places of business; (2) the availability to would-be subscribers of cable television service without undue delay or discrimination, and without excessive signal degradations or outages; and (3) the availability to would-be programmers and advertisers—including sources of information, news, opinion, education, entertainment, and home and business services—now excluded as a practical matter from the mass television broadcasting medium, of nondiscriminatory and legally guaranteed access to leased cable channels for the purpose of transmitting their messages. (See the Public Utilities

Act, Secs. 8, 38, 49, 50, 54.)" *Interim Opinion and Order*, p. 13.

The Commission's opportunity to pursue these objectives, and to meet the local broadband communications needs and interests of Illinois residents, will be very much affected by the disposition of the case at bar. For the Federal Communications Commission takes the position—which was rejected by the Court below—that it has plenary authority to regulate the services provided by cable television systems, whether or not such services entail the delivery of broadcast television or radio signals and regardless of adverse competitive effect on the FCC's television and radio licensees. Illinois is not located in the Eighth Judicial Circuit and so cannot rely on the contrary decision in this case by the Court of Appeals. But if that decision is not reviewed, and the issue of State versus federal jurisdiction over cable is not authoritatively resolved by this Court, Illinois in company with other States will be left at hazard to develop alternative patterns of State regulation pending some indefinite later occasion to seek clarification from this Court.

Thus the interest of Illinois as *amicus curiae* is to seek relief from the jurisdictional uncertainties highlighted by the decision below, in order to allow the administrative processes involved in establishing State regulation of broadband cable communications to go forward.

REASONS FOR GRANTING CERTIORARI

Certiorari should be granted to determine whether the Court below correctly decided that the Federal Communications Commission lacks authority under the Federal Communications Act, 47 U.S.C. §§ 151 *et seq.*, to require origination of programming by cable television systems having a specified number of subscribers, on the ground

that such a rule is not reasonably ancillary to the FCC's responsibilities in the broadcasting field.[1] The decision of the Court of Appeals is reported at 441 F. 2d 1322.

1. This is an important question of federal law that has not been, but should be, settled by this Court.

The question presented is in fact precisely the one reserved by this Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). In that case the Court upheld regulation of cable systems by the FCC, but only insofar as necessary to prevent frustration of explicit broadcasting objectives, such as nationwide dispersal of television station allocations and promotion of UHF channels, committed by the Congress to the Commission. The authority recognized in the Court's opinion (at 178) was expressly "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." The Court disclaimed any view as to the authority of the Commission, if any, to regulate CATV under any other circumstances or for any other purposes.

Two terms later this Court affirmed without opinion the judgment of a three-judge District Court upholding the validity of State public-utility regulation of cable systems against the claim, *inter alia*, of federal preemption. *TV Pix, Inc.* v. *Taylor*, 396 U.S. 556 (1970), *affirming* 304 F. Supp. 459 (D. Nev. 1968). The Nevada

1. Testifying before the Communications Subcommittee of the House Commerce Committee on July 22, 1971, FCC Chairman Burch stated that "this decision puts in question the extent of the Commission's jurisdiction to regulate aspects of cable that do not reach to its economic impact on broadcasting and, as a consequence, we are preparing to seek Supreme Court review of the 8th Circuit decision."

statute thus upheld was one empowering the Public Service Commission to certificate cable operators, regulate their rates, and supervise the adequacy of their services and facilities.

Now, another two terms later, this Court is presented with the occasion to reconcile the reach of those two decisions. For States like Illinois are increasingly concerning themselves with the regulation of local service offerings by cable systems, while the Federal Communications Commission has been steadily expanding its claims to regulate aspects of cable going well beyond its economic impact on broadcasting. The question reserved in *Southwestern Cable* is now ripe for decision.

2. Clarification of the jurisdictional question at issue in this case is needed by the States, the FCC, and the Congress.

At the time that the *Southwestern* case was submitted, it was possible to state that "CATV systems have been largely unregulated at the State level."[2] That situation has been sharply changing. Fully five States have now adopted public utility regulation of cable systems,[3] and others are moving in the same direction. Last December the New York Public Service Commission, after concluding an investigation requested by Governor Nelson Rockefeller, issued a lengthy report urging that it be given regulatory jurisdiction.[4] Legislation for that pur-

---

2. Brief for the United States in No. 363, O.T. 1967, p. 8.

3. Connecticut, Nevada, Rhode Island, Vermont, and Hawaii. See New York Public Service Commission Report, infra note 4, pp. 103-17.

4. New York Public Service Commission, Regulation of Cable Television by the State of New York (December, 1970).

pose is now pending there as well in several other states such as California, Maryland, and Oklahoma.[5] Illinois has of course taken the first step of asserting jurisdiction under existing law, and other interested states may well follow suit.[6]

At the same time the FCC has been progressively parting company with the rationale on which it obtained this Court's approval of federal regulation in *Southwestern.* In its notice initiating the rulemaking proceedings that led to the program-origination rule at issue in this case, the FCC contended that it had authority "to prevent such [cablecasting] operations from having detrimental consequences to the public interest *and to promote their development along lines likely to maximize the potential benefit to the public.*"[7] The italicized language marked a departure from this Court's rationale in *Southwestern* but its significance was marked by the Commission's then-continuing recognition of strong State and local regulatory interest—over such matters as reserva-

---

5. National Association of Regulatory Utility Commissioners, 1971 Bulletin, No. 6, p. 8; No. 12, p. 13; No. 14, p. 9; No. 21, p. 13. New York and New Jersey last June each adopted a one-year moratorium on franchising of new cable systems, pending enactment of statewide regulatory legislation. N. Y. Laws, Ch. 419 (1971); N. J. Laws, Ch. 221 (1971).

6. This development appears to be pertinent to the practical principle enunciated in Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 19-20 (1961), an authority relied upon by the respondents below: ". . . in a borderline case we must ask whether state authority can practicably regulate a given area. . . ."

7. Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C. 2d 417, 422 (1968) (emphasis added).

tion of channel capacity for public and municipal originations, and channel leasing requirements and practices.[8]

Since that time the Commission has gone very much further. It has advised the Congress that, notwithstanding the Court of Appeals decision in this case, it considers that it has authority to require cable systems to employ their channel capacity to provide a diversity of Commission-specified services beyond the carriage of television signals picked up from television broadcast stations.[9] And it has acted on this understanding by proposing a variety of rules for nonbroadcast services by cable systems, as to which State and local regulation would be expressly precluded.[10] If the FCC indeed has authority to go this far, realization by the Illinois Commerce Commission of its stated regulatory objectives may be severely curtailed.

But the FCC has not rested even with its current proposals. It has taken the position publicly that it has plenary power to preempt the entire field of cable regulation—including licensing of systems, rate regulation, and supervision of service deficiencies. For example, in testimony to the Senate Commerce Commission on June 15, 1971, Chairman Burch stated:

> "Our thinking right now is we would not want to go in and take over the entire field. It is a question of judgment, not a question of law or the constitution. And very candidly, we could be wrong; very candid-

8. 15 F.C.C. 2d, at 425, 427.

9. Memorandum of General Counsel, FCC, submitted to the Senate Commerce Committee, June 14, 1971.

10. Letter from the Commission to the Communications Subcommittees of the House and Senate Commerce Committees, August 5, 1971, pp. 26-39, esp. 31-33.

ly, we could change our minds. If our experience is such we do not like the way it is working, we could pre-empt more of the field. That with the attendant hardship of moving into an area that a state has started dealing with."[11]

These effects could all be brought about without the benefit of Congressional guidance. This is so because the Commission has cut itself loose from the protection of tasks committed to it in the Federal Communications Act, and their accompanying standards for decision. One is reminded of Justice Cardozo's admonitions about the Constitutional perils of such a "roving commission," without adequate Congressional delegation.[12] Short of the Constitutional issue, however, is the propriety of attributing to Congress an intent to authorize such free-lance activities when in the sections of the Act relating to specifically regulated industries the Congress was at such pains to articulate delimiting criteria.[13]

It might be thought that Congress itself could be expected to restrain the Commission from any excesses it considered unauthorized. But that would be to ignore the practicalities of the situation. Regulation of cable television is a highly controversial issue in politcal terms—putting the interests of cable operators, broadcasters, and copyright owners against each other (to say nothing of States, cities, and the FCC). The Commission itself has

11. Hearings before the Senate Commerce Committee, June 15, 1971, p. 191 (preliminary transcript).

12. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

13. See, e.g., 47 U.S.C. Secs. 303, 307, 319 (radio licensees); 201-205, 214, 220 (common carriers).

repeatedly asked the Congress for support and guidance, without avail.[14] So long as the Commission can walk the tightrope of equal displeasure from all contending interest groups, the Congress is likely to continue to confine itself to an observer's role.[15] Only authoritative resolution by this Court of the reach of the existing Communications Act can, as a practical matter, liberate the Congress to consider for itself what should be the appropriate division of federal and State authority over broadband cable communications.

CONCLUSION

For the reasons stated, this Court should grant certiorari to review the question of the extent of the Federal Communications Commission's presently delegated authority to regulate the nonbroadcast services of cable television systems.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street,
Chicago, Illinois 60601,

PETER A. FASSEAS,
Special Assistant Attorney General,

Counsel for The State of Illinois as Amicus Curiae.

ROLAND S. HOMET, JR.,
Of Counsel.

---

14. See, e.g., 15 F.C.C. 2d 417, 421.

15. Cf. Brief for the United States in United States v. Southwestern Cable Co., No. 363, O.T. 1967, pp. 40-41 n. 31.